

Kumar (Migration) [2019] AATA 298 (11 January 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Naresh Kumar
CASE NUMBER:	1802448
HOME AFFAIRS REFERENCE(S):	BCC2015/4005595
MEMBER:	Justine Clarke
DATE:	11 January 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made on 11 January 2019 at 2:26pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) – Subclass 820 (Spouse) – relationship ceased – no evidence of an ongoing relationship – sponsorship withdrawn – decision made on the papers – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359C, 360, 363A

Migration Regulations 1994 (Cth), r 1.15A Schedule 2 cls 820.211, 820.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, Mr Naresh Kumar, is a 30 year old national of India.
3. On 22 December 2015, the applicant applied for the visa on the basis of his relationship with his sponsor, Josephine Nileshni Lata Kumar.
4. At the time of application, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. The primary criteria include cl.820.221 which essentially requires that, at the time of decision, the applicant continues to meet the requirements of the applicable time of application subclause, being cl.820.211(2), (5), (6), (7), (8) or (9)—that is, the applicant continues to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and/or certain circumstances exist.
5. The applicant provided the Tribunal with a copy of the primary decision. The delegate was satisfied that, at the time of application on 22 December 2015, the applicant and his sponsor were in a spouse relationship for the purpose of s.5F of the Act and therefore met cl.820.211(2) of Schedule 2 to the Regulations. However, the delegate refused to grant the visa on the basis that, at the time of the primary decision, the applicant did not satisfy cl.820.221(1)(a) because he did not continue to meet cl.820.211(2). The primary decision states that:
 - On 3 October 2017, the sponsor informed the Department that she wished to withdraw her sponsorship as her relationship with the applicant had ceased.
 - On 4 October 2017, the Department wrote to the applicant to inform him of the criteria that must be met to continue with the visa application. The letter requested the applicant to contact the Department if the relationship had resumed and, alternatively, to provide certain information if he wished to proceed with the application despite the breakdown of the relationship. The Department also informed the applicant that he could withdraw his application.
 - As at 11 January 2018 (the date of the Department's refusal decision), the Department had not received a response from the applicant.
6. On 31 January 2018, the applicant applied to the Tribunal for review of the primary decision. The applicant was represented in relation to the review by a registered migration agent.
7. On 5 December 2018, the Tribunal wrote to the applicant pursuant to s.359A of the Act, inviting him to comment or respond to information that it considered would be the reason, or a part of the reason, for affirming the decision under review. The information related to the withdrawal of sponsorship by the sponsor. The invitation was sent to the applicant's representative which was the last address provided in connection with the review. The letter stated that, if the comments or response were not provided in writing by 19 December 2018 or an extension of time not sought by that time, the Tribunal may make a decision on the review without taking further steps to obtain the comments or response. The applicant was

informed that, in such circumstances, he would lose any entitlement he might otherwise have had under the Act to appear before the Tribunal to give evidence and present arguments. Information about the loss of the right to a hearing was in bold type.

8. On 8 January 2019, the applicant's representative wrote to the Tribunal, acknowledging receipt of the Tribunal's letter of 5 December and stated the following:
 9. We have received instructions from Mr Kumar that he is no longer in a relationship with his Sponsoring Partner.
 10. We have requested Mr Kumar to provide us with information and to provide a comment on the information received by the Tribunal.
 11. Mr Kumar has expressed his intention to appear before the Tribunal and present evidence.
12. The applicant did not provide his comments or response within the prescribed period and no extension of time was sought nor granted.
13. In these circumstances, s.359C applies and pursuant to s.360(3), the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that, if a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40. The Tribunal has decided to proceed to decision without taking further steps to obtain information such as inviting the applicant to an interview. The Tribunal has taken this course because of the applicant's limited engagement in this review.
14. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue before the Tribunal is whether, at the time of this decision, the applicant continues to be the spouse or de facto partner of the sponsor or meets the alternative criteria in cl.820.221(2) or (3).

Whether the parties are in a spouse or de facto relationship

16. Clause 820.221 requires that, at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.
17. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)–(d).
18. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.
- 19.

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant and the sponsor were married in Logan, Queensland on 27 February 2016. A copy of their registered marriage certificate is on the Department's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

21. As stated earlier, the applicant provided the Tribunal with a copy of the primary decision which indicates that the applicant sought the visa on the basis of his relationship with the sponsor but that in October 2017 the sponsor advised the Department that the relationship had ended.
22. The primary decision outlines that the Department put the applicant on notice that the ongoing nature of the relationship was at issue. Further, the primary decision itself places the applicant on notice that the ongoing nature of the relationship is at issue.
23. Since the primary decision was made on 11 January 2018, the applicant has presented no documentary evidence to show that he continues to be in a relationship with the sponsor.
24. At the time of this decision, there is no evidence before the Tribunal that the applicant and the sponsor:
- share their finances, have joint liabilities or jointly contribute to expenses;
 - maintain a joint household or share housework—indeed, that they continue to live together or do not live separately and apart on a permanent basis;
 - continue to represent themselves to others as being in a relationship or that they socialise together; and
 - draw companionship and support from each other or continue to have a mutual commitment to the relationship.

25. CONCLUSION

26. The Tribunal makes the following findings.
27. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s.5F(2)(a) of the Act.
28. From the evidence before the Tribunal, the Tribunal is not satisfied that, at the time of this decision, the applicant and the sponsor:
- have a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
 - have a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
 - live together, or do not live separately and apart on a permanent basis, as required by s.5F(2)(d) of the Act.

29. Given these findings the Tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant does not meet cl.820.221(1)(a).
30. Further, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets cl.820.221(1)(b) on the basis of meeting the alternative criteria in cl.820.221(2) or (3).
31. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

32. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).